

No. 3959

IN THE 3

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN COMMERCIAL COMPANY OF
ALASKA (a corporation),

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

Brief for Defendant in Error

JOHN RUSTGARD,

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BRIEF FOR DEFENDANT IN ERROR.

Very little needs be added to what the learned court below said in his opinion in this case. There are many decisions on record supporting the views of plaintiff in error, but all of these, save one, were submitted to this tribunal and to the Supreme Court in previous appeals from Alaska. The one new case, Thompson vs. McLeod, was disposed of by the lower court in his opinion, and will not be further discussed at this time.

Counsel concede that if the statute had referred to the "tax *for* the pelts" instead of "tax *on* the pelts" the law would be valid.

Their logic sounds somewhat antiquated. The time has passed when courts can be made to stumble over mere words. It has been discovered that what applies to the interpretation of scripture equally applies to the interpretation of a statute: "The letter killeth, but the spirit maketh whole."

There is no difference in *principle* between the statute here in question and those statutes considered in the former adjudications by this and the Supreme Court. Indeed, there is not much difference in language.

In the Acts of 1913, 1915 and 1917, held valid by this court, the tax was "4½ cents per case *on* Kings, Reds or Sockeyes; 2½ cents per case *on* Medium Reds, and 2 cents per case *on* all others. * * * 2½ cents per hundred pounds *on* all fish salted or mild cured. * * * Oil \$2.00 *per* barrel, and fertilizer \$2.00 *per* ton."

The distinction which counsel endeavors to draw between the statute here under consideration and those statutes formerly construed by this court does not exist as a matter of fact, but even if that distinction did exist it were purely technical and would not involve the principle. The statute as a whole and not segregated phrases must be construed. When this is done it becomes obvious that the tax is on the business and not on the property: The title of the act declares it a license tax upon the business. The first section provides that no one shall engage in the business unless he has a license, and Section 2 provides that no one shall receive a license unless he agrees in writing to pay the tax upon the pelts handled. The fact that the word "upon" instead of the word "for" is used in the last clause surely does

not change the spirit, purpose or meaning of the law.

The identical question raised by learned counsel was recently passed upon by the Supreme Court of Oregon in the case of *Re Inman*, 199 Pacific 615 (620). That decision involved an inheritance tax, but the question was whether or not the tax, by the wording of that statute, became a property tax. The Court said:

“Although, as previously explained, language may be found in our inheritance tax act as in most of the inheritance tax statutes, such as ‘tax on estates,’ ‘tax levied on such estates,’ property ‘shall be subject to a tax,’ and the like; yet our statute, when construed in its entirety, provides for a tax which is plainly and indisputably a perfect example of an inheritance tax. The tax is on the right to receive; but the amount of the tax laid upon such right is measured by the value of the property to which the right attaches.”

It is next contended that because the fur tax act makes the ~~est~~^{tax} a lien upon the furs it makes the whole system property tax. It will be observed that this is no new feature. It was taken from the former acts. The tax law of 1915, held good by this court, provides:

“All taxes levied, laid or provided for in this act and penalties and interest accrued are hereby declared a lien upon the real and personal property of the person, firm or corporation liable therefor, paramount and superior to all mortgages, hypothications, conveyances and assignments.”

Except for this feature, the tax, especially against itinerant buyers, could not be enforced.

Obviously the tax in question is not upon the furs but upon the privilege of dealing in furs. The amount of this tax is based upon the character of the pelts and to that extent based upon the value and amount of the transaction.

As was aptly stated by Mr. Justice Holmes in *New York Trust Company vs. Eisner*, 256 U. S. 345, in dealing with a somewhat similar question arising under the inheritance tax laws of Massachusetts:

“Upon this point a page of history is worth a volume of logic.”

The question in the last named case, as well as in *Knowlton vs. Moore*, 178 U. S. 41, and *Scholey vs. Rew*, 23 Wallace 331, was whether or not ^{an} ~~on~~ inheritance tax or succession tax based upon the value of property and made a lien thereon was a property tax. In each case the court held it was not.

In the last named case the Supreme Court says:

“Nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land as the lien is merely an appropriate regulation to secure the collection of the exaction.”

It may be pardonable to again quote from the Supreme Court of Oregon:

“Nor is such tax necessarily made a direct tax on property merely because the statute provides for a lien upon the property and requires payment by the executor or administrator, as such provisions are nothing more than appropriate regulations to secure the collection of

the tax. Although in our state statute, as in many inheritance tax statutes, language may be found referring to 'rate of tax on all estates' and 'taxes levied on such estates,' and the like, this language does not of itself make the tax a direct property tax. The value of the property is used merely as a measure of the amount of the tax to be paid and the property is then looked to for the purpose of insuring payment, just as in a multitude of instances property is looked to for the purpose of insuring payment of debts due private persons." In re Inman, *supra*, 619.

It will thus be observed that the decision of the lower court is supported both by reason and by authority.

Respectfully submitted,

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